Supreme Court, U.S.
FILED
AUG 7 1996
CLERK

(3)

No. 95-1987

In the Supreme Court of the United States

OCTOBER TERM, 1995

DAYTON HUDSON DEPARTMENT STORE COMPANY, A DIVISION OF DAYTON HUDSON CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

17pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the union's erroneous campaign statement concerning petitioner's profits did not warrant setting aside the representation election won by the union.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

AWB Metal, Inc., 306 N.L.R.B. 109 (1992), enforced, 4 F.3d 993 (6th Cir. 1993)	10
Allis-Chalmers Corp., 278 N.L.R.B. 561 (1986)	10
Certainteed Corp. v. *NLRB*, 714 F.2d 1042 (11th Cir. 1983)	10, 12
General Knit of California, Inc., 239 N.L.R.B. 619 (1978)	9
Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962)	8, 9
John W. Galbreath & Co., 288 N.L.R.B. 876 (1988)	10
Mattera Litho, Inc., 267 N.L.R.B. 375 (1983)	9-10
Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982)	3, 8, 9, 12
Mt. Carmel Medical Center, 306 N.L.R.B. 1060 (1992)	10
NLRB v. *A.J. Tower Co.*, 329 U.S. 324 (1946)	8
NLRB v. *Best Products Co.*, 765 F.2d 903 (9th Cir. 1985)	10
NLRB v. *Chicago Marine Containers, Inc.*, 745 F.2d 493 (7th Cir. 1984)	10
NLRB v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975)	12
NLRB v. *Monark Boat Co.*, 713 F.2d 355 (8th Cir. 1983)	10
NLRB v. *New Columbus Nursing Home, Inc.*, 720 F.2d 726 (1st Cir. 1983)	10

Cases—Continued: Page

NLRB v. *Rhone-Poulenc, Inc.*, 789 F.2d 188 (3d Cir. 1986) 10

NLRB v. *Semco Printing Center, Inc.*, 721 F.2d 886 (2d Cir. 1983) 10

NLRB v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953) 12

Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311 (1977) 9

Van Dorn Plastic Machinery Co. v. *NLRB*, 736 F.2d 343 (6th Cir. 1984), cert. denied, 469 U.S. 1208 (1985) 5, 10

Statute:

National Labor Relations Act, § 8(a)(5), 29 U.S.C. 158(a)(5) 4

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1987

DAYTON HUDSON DEPARTMENT STORE COMPANY, A DIVISION OF DAYTON HUDSON CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals after remand (Pet. App. 1a-12a) is reported at 79 F.3d 546. The supplemental decision and order of the National Labor Relations Board (Board) on remand (Pet. App. 105a-108a), including the decision of the administrative law judge (Pet. App. 56a-104a), is reported at 314 N.L.R.B. 795.

The earlier decision of the court of appeals, remanding the case to the Board (Pet. App. 39a-55a), is reported at 987 F.2d 359. The initial decision and order of the Board (Pet. App. 30a-38a) is reported at

302 N.L.R.B. 982. The Board's decision (Pet. App. 27a-29a) and the hearing officer's report (Pet. App. 13a-26a) in the representation proceeding are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1996. The petition for a writ of certiorari was filed on June 10, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owns and operates a department store in Westland, Michigan. Pet. App. 40a. On March 12, 1990, the Union[1] filed a representation petition with the National Labor Relations Board (Board), seeking an election among the employees at the Westland store. *Id.* at 13a-14a. On May 11, 1990, the Board conducted an election; the Union prevailed by a vote of 274 to 179. *Ibid.* Petitioner subsequently filed objections to the election. *Id.* at 14a. In one of its objections, petitioner alleged that a letter mailed by the Union to the Westland store employees on May 8, 1990, contained gross misrepresentations of fact which warranted setting aside the election result. *Id.* at 16a-17a.[2]

---

[1] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. The Union was a party to the proceedings in the court of appeals (see Pet. App. 1a, 39a) and has filed a brief in opposition to the petition for a writ of certiorari in this Court.

[2] Petitioner raised a number of other election objections, including an allegation that the Union had used forged authorization cards in an attempt to generate employee support prior to the election. Pet. App. 41a-44a. The Board, upheld by the court of appeals, overruled those objections (*id.* at 9a-12a, 15a-

The May 8, 1990 letter, which was two pages in length, stated, among other things, that petitioner had "claimed a profit of OVER 60 MILLION DOLLARS in our Westland Hudson's store alone last year," and was signed "Your Fellow Workers The Westland Employees Organizing Committee." Pet. App. 17a; see also *id.* at 109a-111a (full text of letter). In fact, however, petitioner had made a profit of only $1.4 million at the Westland store in 1989, and the May 8 letter had been produced and mailed by Union representatives, not (as the letter suggested) by Westland employees on the organizing committee. *Id.* at 17a-18a.

2. a. After a hearing, the Board's hearing officer recommended that the Board overrule petitioner's election objection. Pet. App. 19a. The hearing officer explained that, under *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982), "the Board will no longer probe into the truth or falsity of the parties' campaign statements and will not set elections aside on the basis of misleading campaign statements." Pet. App. 18a. The hearing officer further observed that, under *Midland*, "as long as the campaign material is what it purports to be, i.e., mere propaganda of a particular party and not an issue of forgery, the task of evaluating its contents will be left solely to the employees." *Ibid.*

Applying those principles, the hearing officer found that, although the May 8, 1990 letter was "concededly wrong" in claiming that the Westland store had generated a profit of over $60 million in 1989, that

---

29a, 42a n.3, 44a-47a, 50a, 62a-93a, 105a-108a), and petitioner does not seek review of the Board's disposition of them in this Court.

claim had been made "openly in [a] document[] which the voters were able to recognize as campaign propaganda," and that "there is no reason to conclude that employees would reasonably believe they could rely on their fellow employees or the [Union] for absolute accuracy and expertise regarding * * * 1989 Westland profits." Pet. App. 19a. The hearing officer also rejected petitioner's contention that the May 8 letter amounted to a "forgery" because it had been prepared by the Union rather than Westland organizing committee employees. *Id.* at 19a n.1. The hearing officer explained that the letter did not "rise[] to that level of deception because employees would not reasonably be inclined to assume that the material in [the letter] originated exclusively from fellow employees and had no input from the [Union]." *Ibid.*

b. On December 26, 1990, the Board issued a decision in which it accepted the hearing officer's recommendation, overruled petitioner's election objection, and certified the Union as the exclusive collective-bargaining representative of the Westland store employees. Pet. App. 27a-29a. Petitioner, however, refused to bargain with the Union. The Board's General Counsel issued an unfair labor practice complaint against petitioner. On May 15, 1991, the Board rendered summary judgment against petitioner for its refusal to bargain in violation of Section 8(a)(5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5), and ordered it to bargain on request with the Union. Pet. App. 30a-36a.

3. Petitioner filed a petition for review of the Board's order in the court of appeals. On March 1, 1993, the court (with one judge dissenting) remanded the case to the Board. Pet. App. 39a-55a. The court

explained that, in *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), cert. denied, 469 U.S. 1208 (1985), it had "[i]n dicta * * * indicated [its] 'reluctance to be bound by the *Midland National Life* rule in every case.'" Pet. App. 49a (quoting *Van Dorn*, 736 F.2d at 348).[3] The court concluded:

> We continue to adhere to *Van Dorn* as representing a narrow but appropriate limitation on the expansive rule announced in *Midland National Life*—namely, that where the pervasiveness of misrepresentation or the artfulness of deception during an election campaign renders employees so unable to separate truth from untruth that their free and fair choice is affected, an election must be set aside even in the absence of proof that forgery has occurred.

Ibid. The court thus remanded the case "to enable the Board to reevaluate, in light of our reaffirmation here of *Van Dorn*, whether the May 8, 1990 letter, even if not a proven forgery, nonetheless contained misrepresentation and deception pervasive and artful enough to interfere with employees' fair and free choice to such an extent as to require a new election." *Id.* at 51a.

---

[3] In *Van Dorn*, the court stated: "There may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made." 736 F.2d at 348 (quoted at Pet. App. 49a).

4. After a further hearing, an administrative law judge (ALJ) found that the May 8, 1990 letter did not require the holding of a new election under *Van Dorn*. Pet. App. 104a. The ALJ explained that there was no evidence that "the Union's organizing committee did not give at least its tacit approval for the May 8, 1990 letter being issued in its name"; that "the prounion message in the May 8, 1990 letter was not consistent with the sentiments of the Union's organizing committee (which had been campaigning in the store for the Union for 4 months)"; that "the employees were misled into believing that the prounion sentiments in the letter were not obviously campaign propaganda"; or that "the employees would have any reason to believe that the organizing committee members would have any special knowledge of company profits." *Id.* at 102a-103a.[4] The ALJ further found that, "among all the campaign propaganda," the misrepresentation about the Westland store's profits "was one false statement in one long letter," and thus was neither "pervasive" nor "artful." *Id.* at 103a.

The ALJ also determined (as had the Board previously) that the May 8 letter did not warrant a new election under the Board's *Midland* rule. Pet. App. 99a-102a. The ALJ found that "an employee reason-

---

[4] Moreover, the ALJ explained that, "[e]ven if employees believed that the Union would not be assisting the organizing committee by preparing campaign literature for it and believed that the committee members themselves composed and reproduced the long letter unassisted—although the letter was mailed to the employees in envelopes bearing the return address of the Union's regional office—there was nothing in the letter that would cause employees to believe that the committee members would be more knowledgeable about the Company's profits than the Union." Pet. App. 103a.

ably could be expected to recognize the letter as union campaign propaganda" (*id.* at 100a-101a), because "[i]t was received from the [Union's] Region 1A, it bore the printed signature of the Union's organizing committee, it was critical of [petitioner] and its antiunion 'scare tactics,' it was received shortly before the election, and it concluded: 'VOTE YES FOR THE [UNION]'" (*id.* at 101a). Accordingly, the ALJ recommended that the Board reaffirm its 1991 order requiring petitioner to bargain with the Union. *Id.* at 104a.

On August 18, 1994, the Board, accepting the ALJ's recommendation, issued a supplemental decision reaffirming its 1991 bargaining order. Pet. App. 105a-108a.

5. Petitioner filed a petition for review of the Board's supplemental decision in the court of appeals. The court affirmed the Board's supplemental decision. Pet. App. 1a-12a. The court held that "the ALJ did not err in concluding that the May 8, 1990 letter was insufficient to warrant a new election." *Id.* at 8a. The court noted that "[i]t is difficult to assess how many employees may have been affected by the letter's extreme exaggeration of [petitioner's] profitability," and that "some employees may have been deceived as to the real source of the letter." *Ibid.* The court concluded that, "[n]evertheless, in light of the large margin of victory enjoyed by the [Union] and the fact that, prior to receiving the May 8, 1990 letter, voters were undoubtedly aware, in general, that the organization committee was allied with the [Union], we are not prepared to reverse the determination of the Board and the ALJ." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. a. It is well settled that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" under the Act. *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946). Exercising that considerable discretion, the Board held in *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982) that:

> [W]e will no longer probe into the truth or falsity of the parties' campaign statements, and * * * we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is.

Id. at 133 (footnotes omitted); see also Pet. App. 18a, 48a, 95a.

In so holding, the Board abandoned (for a second time) the rule which it had earlier fashioned in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962); under that rule, the Board would order a new election "where there has been a misrepresentation or other similar campaign trickery, which involves a

substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." *Id.* at 224 (footnote omitted).[5] Drawing upon its "cumulative experience," the *Midland* Board concluded that the *Hollywood Ceramics* rule was "unwieldy and counterproductive," and was based on "an unrealistic view of the ability of voters to assess misleading campaign propaganda." 263 N.L.R.B. at 132. By contrast, the Board explained, the *Midland* rule is "a clear, realistic rule of easy application which lends itself to definite, predictable, and speedy results." It also "removes impediments to free speech by permitting parties to speak without fear that inadvertent errors will provide the basis for endless delay or overturned elections" and "promotes uniformity in national labor law by minimizing the basis for disagreement between the Board and the courts of appeals." *Ibid.*

Since its 1982 decision in *Midland*, the Board has consistently applied the rule articulated in that case to determine whether alleged misrepresentations made by parties during an election campaign warrant a new election. See, *e.g.*, *Mattera Litho, Inc.*, 267

---

[5] The Board initially overruled its *Hollywood Ceramics* decision in *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977), where the Board enunciated the rule to which it would ultimately return in *Midland*. However, *Shopping Kart* was overruled in favor of a return to the *Hollywood Ceramics* rule, in *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978). In *Midland*, the Board overruled *General Knit* and reinstated *Shopping Kart*. See *Midland*, 263 N.L.R.B. at 130, 132.

N.L.R.B. 375, 376 (1983); *Allis-Chalmers Corp.*, 278 N.L.R.B. 561, 563 (1986); *John W. Galbreath & Co.*, 288 N.L.R.B. 876, 877 (1988); *AWB Metal, Inc.*, 306 N.L.R.B. 109, 109 (1992), enforced, 4 F.3d 993 (6th Cir. 1993) (Table); *Mt. Carmel Medical Center*, 306 N.L.R.B. 1060, 1060 & n.2 (1992). Moreover, the courts of appeals have consistently upheld the *Midland* rule as a reasonable construction of the Act. See *NLRB* v. *Monark Boat Co.*, 713 F.2d 355, 360-361 (8th Cir. 1983); *Certainteed Corp.* v. *NLRB*, 714 F.2d 1042, 1052-1055 (11th Cir. 1983); *NLRB* v. *New Columbus Nursing Home, Inc.*, 720 F.2d 726, 728-729 (1st. Cir. 1983); *NLRB* v. *Semco Printing Center, Inc.*, 721 F.2d 886, 892 (2d Cir. 1983); *NLRB* v. *Best Products Co.*, 765 F.2d 903, 912-913 (9th Cir. 1985); *NLRB* v. *Rhone-Poulenc, Inc.*, 789 F.2d 188, 191 (3d Cir. 1986).

b. The Board's *Midland* rule has received uniform acceptance in the courts of appeals, including by the court in this case. See Pet. App. 7a. The Sixth Circuit has indicated, however, that a category of misrepresentation nevertheless may be "so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected," even though no forgery for purposes of the *Midland* rule has occurred. *Id.* at 49a (quoting *Van Dorn Plastic Machinery Co.* v. *NLRB*, 736 F.2d 343, 348 (6th Cir. 1984), cert. denied, 469 U.S. 1208 (1985)). Other courts have made a similar suggestion. See *New Columbus Nursing Home*, 720 F.2d at 729 ("Some misrepresentations may be so material and fraudulent as to undermine the employees' freedom of choice."); *NLRB* v. *Chicago Marine Containers, Inc.*, 745 F.2d 493, 498 n.4 (7th Cir. 1984) ("[T]here may be situations in

which it might be inappropriate to be strictly bound by the *Midland* standard.").

c. In this case, the Board, applying *Midland*, found that the Union's May 8, 1990 letter did not constitute the kind of misrepresentation that warranted setting aside the Union's election victory. Pet. App. 16a-19a, 27a-29a, 99a-102a. Then, pursuant to the court's remand, the Board also evaluated the Union's May 8 letter under the *Van Dorn* test and found that, even under that test, the letter did not warrant setting aside the election result. *Id.* at 102a-104a, 105a-108a. The Board's fact-intensive conclusion, which was upheld by the court of appeals (*id.* at 8a), raises no issue warranting further review.

2. Petitioner does not contend that the Board misapplied the *Midland* rule in rejecting its election objection. Rather, petitioner asserts (Pet. 11) that "[t]he Board's current, laissez-faire approach to deceptive preelection propaganda distributed by employers and unions fails to fulfill the Act's promise of free and fair elections." Although petitioner does not explicitly propose an alternative policy, petitioner seems to argue that the Act requires the Board to return to its now-defunct *Hollywood Ceramics* rule, under which misrepresentations made by a party during an election campaign may warrant a new election. See Pet. 13, 19. There is no merit to that contention, however. The courts of appeals, as noted, have uniformly rejected the claim that the Board's *Midland* rule is inconsistent with the Act. As the Eleventh Circuit has explained, "[t]here is considerable analytical and empirical support" for the Board's current position that "the speculative benefits deriving from its intervention in the electoral process to correct last-minute misrepresentations by

the parties do not outweigh the known costs imposed on free choice and majority rule principles by that intervention." *Certainteed Corp.*, 714 F.2d at 1053-1054.

Petitioner is also mistaken in suggesting (Pet. 15) that the *Midland* rule is unsound because it is the product of "policy oscillations, typically triggered by slight changes in the Board's composition." See also Pet. 12 (asserting that the "history [of *Midland*] is simply one of the Board bouncing back and forth between two diametrically opposed standards of conduct"). As the Board explained in *Midland*, "[t]he nature of administrative decisionmaking relies heavily upon the benefits of the cumulative experience of the decisionmakers." 263 N.L.R.B. at 132. The *Midland* Board acted well within its authority in abandoning the *Hollywood Ceramics* rule as "unwieldy," "counterproductive," and rooted in "an unrealistic view of the ability of voters to assess misleading campaign propaganda" (*ibid.*), for " '[c]umulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated," and "[t]he constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (quoting *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953)).

Finally, petitioner asserts (Pet. 19) that decisions such as *Van Dorn* illustrate a "lack of uniformity" between the Board and the courts as to the proper standard for determining whether campaign misrepresentations warrant a new election. Even if petitioner's claim were accurate, however, this case

is not an appropriate vehicle for addressing it. Under either the Board's *Midland* rule or the court's *Van Dorn* test, petitioner's election objection was correctly overruled, and it was therefore obligated to bargain with the Union as the exclusive representative of the Westland store employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

AUGUST 1996